

Protest of) Date: August 4, 1989
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EQUIPMENT SYSTEMS, INC)
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Solicitation Nos. 089984-89-A-0039) P.S. Protest No. 89-48
089984-89-A-0043)

DECISION

Equipment Systems, Inc. (ESI), timely protests the cancellation of Solicitation No. 089984-89-A-0039 after the receipt of offers.

The Windsor, CT, Facilities Service Center (FSC) was requested to award a contract for the demolition of eight obsolete parcel sorter machines in the North Jersey Postal Facility, Kearney, NJ.

Asserting the need to avoid costly time delays which attend fully competitive procurements and citing Procurement Manual (PM) 1.4.2 c.2 ("Approval of Deviations"), the contracting officer sought and obtained from the Director, Office of Design and Construction, Postal Service Headquarters, authority to obtain proposals from five firms in the field and to negotiate the lowest price instead of using "formal advertising." The contracting officer issued Solicitation No. 089984-89-A-0039 on May 1, 1989, to five mechanization firms with which the FSC had previously dealt. Notice of the solicitation was not published. Offers were due May 22.

Contemporaneously with the issuance of the solicitation, a pre-proposal conference was held May 1 attended by representatives of the five solicited firms.^{1/} One of the attendees at the

^{1/}The five firms were:

Equip Design Systems, Inc.
Chicago, IL

Craft Conveyor and Millwrighting, Inc.
Secaucus, NJ

EMCO Industries, Inc.

conference was Mr. Daniel Bingenheimer, who signed the conference attendance sheet as the representative of E-Quip Manufacturing Co., Inc., the parent company of Equip Design Systems, Inc. (Equip Design).

The contracting officer issued an amendment to the solicitation on May 4 which added pages to the General Wage Decision included in the solicitation. On May 11, Mr. Bingenheimer called the FSC and requested that the solicitation package be sent to "his office" in Orland Park, IL. A solicitation package was sent to Mr. Bingenheimer, but the package omitted the May 4 amendment.

Three offers were received by the offer due date, including one from the protester, a newly formed company based in Orland Park, IL, which was submitted by Mr. Bingenheimer, ESI's vice-president. The contracting officer did not initially notice that this offer was not from one of the five solicited firms, and that the offer had not acknowledged receipt of the May 4 amendment. By letters of May 22 and May 31, addressed to Mr. Bingenheimer, the contracting officer requested verification of ESI's cost estimates, pointing out that its offered price was considerably lower than the Postal Service's estimate. ESI replied to these inquiries by letters of May 26 and June 5, providing breakdowns of its costs and confirming its offer.

On June 7, the contracting officer advised ESI and the other offerors of the cancellation of the solicitation and of the contracting officer's intention to re-solicit the project "on the open market." The apparent justification for the cancellation was that ESI's offer was unacceptable because of its failure to acknowledge the May 4 amendment, while the other offers were excessively highly priced.

ESI's protest followed. It contends that it should not be responsible for failing to acknowledge the amendment since the FSC admits that the amendment was never sent to it. Further, ESI contends that the decision not to award it the contract was improperly influenced by comments from Equip Design about Mr. Bingenheimer's departure from that company, and the lack of experience of the newly formed ESI.^{2/}

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Cranston, RI

Selco Steel Erectors Co.
West New York, NJ

The Maintenance Co., Inc.
Long Island City, NY

^{2/}ESI is under a misconception that it had already received award when the solicitation was cancelled. The record does not support

The contracting officer published notice of the resolicitation on June 9 in the Commerce Business Daily. This solicitation, No. 089984-89-A-0043, was issued pursuant to fully competitive practices including publication, and provided an offer due date of July 11. ESI protests the inclusion in this solicitation of a requirement that "[t]he successful firm must have five (5) years' documented experience in this type of work." ESI alleges that this requirement was intended to exclude ESI since it was a newly formed company.

The contracting officer states that the five-year experience requirement was necessary to protect the interests of the Postal Service in a fully competitive procurement, but had not been necessary in the previously contemplated approach. Further, the contracting officer states that Mr. Bingenheimer's five-year experience and his position as a principal officer of ESI would be counted toward qualifying ESI under the re-issued solicitation.

Discussion

The original solicitation was issued under a deviation to the PM which limited competition to receipt of proposals from five firms and contemplated discussions to arrive at the contract price. The procurement scheme utilized in the cancelled solicitation was not consistent with the variance contemplated by the Determination and Finding which did not authorize abandonment of the publication requirements of the Procurement Manual. PM 3.2.

The solicitation thus was contrary to PM regulations and was not authorized by the deviation. Because the solicitation was fatally flawed, we can envision no harm to ESI arising out of its cancellation.

The protester's concerns about the five-year experience requirement in the re-solicitation amount to allegations of improper inclusion of an unduly restrictive requirement and of bad faith conduct on the part of the contracting officer in seeking to exclude ESI.

The standard of review of allegations of undue restrictions is that:

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this view.

... it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

E-Z Copy, Inc., P.S. Protest No. 88-61, December 22, 1988, quoting Portion-Pac Chemical Corp., P.S. Protest No. 84-49, August 1, 1984.

The contracting officer explained that the requirement was necessary to protect the interests of the Postal Service in this fully competitive procurement, which meets his prima facie burden. ESI has not shown the requirement to be unnecessary or unreasonable and thus has failed to show that the requirement is clearly unreasonable. Further, the requirement does not prejudice ESI because the contracting officer has stated that the experience of Mr. Bingenheimer would be considered in qualifying ESI under the five-year requirement. This is appropriate since, in evaluating the experience of a new business, a contracting officer may consider the previous experience of supervisory personnel. LD Research Corporation, Comp. Gen. Dec. B-230912.3, September 9, 1988, 88-2 CPD ¶ 223.

The protester's allegation of bad faith conduct by the contracting officer in inserting the five-year requirement also fails. Allegations of bad faith must be proven by virtually irrefutable proof of malicious and specific intent to harm the protester, not merely by inference or supposition. Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988. The evidence presented by ESI does not meet this standard of proof. In its protest, ESI admits that it "was repeatedly advised by USPS's personnel to re-bid." Also, the contracting officer unequivocally states that ESI's re-offer, taking into account the experience of Mr. Bingenheimer, would be considered. Thus, there is no reason to suspect that ESI would be precluded from full participation in the re-issued solicitation.

The protest is denied.

William J. Jones
Associate General Counsel

Office of Contracts and Property Law
[checked against original JLS 5/24/93]